INDEX TO PETITION

Table of Cases

Table of Statutes Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1948

No. 113

BATH MILLS, INC.,

Petitioner,

vs.

THEODORE ODOM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Supreme Court of the United States
Your Petitioner Respectfully Show:

Summary and Short Statement of the Matter Involved

This action was removed to the District Court of the United States for the Eastern District of South Carolina, Aiken Division, because the amount in controversy exceeds Three Thousand Dollars and the defendant is a non-resident of South Carolina. The Complaint (R. pp. 3-7) presents a typical tort case, for personal injury to plaintiff (the

respondent herein) who was an employee of the defendant (the petitioner herein).

The matter involved, at this juncture, arises out of the fact (R. p. 9) that the South Carolina Workmen's Compensation Act is optional in character, and that the petitioner had availed itself, by giving timely notice, of its right to elect not to operate under it and to have its provision not apply to it and its employees, but to have claims against it tried in the Courts. The Act, however, provides (Sec. 15 of Act, Sec. 7035-17 of South Carolina Code of 1942 set out in full at p. 9 of the record) that an employer who elects not to operate under the Act, shall not "be permitted to defend any suit at law upon any or all of the following grounds:

> "(a) That the employee was negligent.
>
> "(b) That the injury was caused by the negligence of a fellow employee.
>
> "(c) That the employee has assumed the risk of the injury."

The defendant in the District Court, now the petitioner, contended that under the decisions of the Supreme Court of South Carolina there is a vast difference between negligence on the one hand and recklessness, willfulness and wantonness on the other hand and between contributory negligence on the one hand and contributory recklessness, willfulness and wantonness on the other hand, and that as matter of proper statutory construction under the decisions of the Supreme Court of South Carolina that when, as to the matter of negligence, the South Carolina Act in derogation of common law deprives the employer only of the defense of contributory negligence, that it does not deprive him of the separate and distinct defense of contributory recklessness, wantonness or willfulness, hence, in its answer (R. pp. 7-8) the petitioner, then the defendant, set

up for a first defense a virtual general denial, and for a second defense alleged that the plaintiff (now the respondent) was guilty, on the occasion in question of contributory recklessness and wantonness and therefore could not recover.

The main question now involved is whether under an optional Workmen's Compensation Act (such as exists in South Carolina) which deprives an employer, who elects not to operate under it, of the defense of contributory negligence, such employer is also deprived of the defense of contributory recklessness and contributory wantonness and contributory willfulness; or whether to the contrary, the decisions of the Supreme Court of South Carolina do not establish the fact that negligence and contributory negligence are different and distinct legal doctrines from recklessness, willfulness and wantonness and contributory recklessness, contributory wantonness and contributory willfulness, as is hereinafter set out, and whether under the decisions of the South Carolina Courts the rule of *expressio unius est exclusio alterius,* does not govern this case. The petitioner also contends that to construe the statute in question as depriving it of the defenses of contributory recklessness and contributory wantonness would constitute the taking of defendant's property without due process of law in violation of due process clauses of the Constitution of the United States.

The respondent (then the plaintiff) moved to strike the second defense, the purpose of which has just been stated, from the answer. The District Judge granted the motion (R. pp. 10-13). The case was tried in the District Court, resulting in a verdict of $5,000.00 in favor of respondent. Judgment was duly entered and the case was appealed to the Circuit Court of Appeals for the Fourth Circuit which Court affirmed the judgment in an opinion which is set out at pages 18-21 of the Transcript of Record.

The baleful effect of the ruling of the District Court striking bodily from the answer, the petitioner's second defense of contributory recklessness and contributory wantonness is officially described in the Stipulation of the Counsel set out in the Transcript of Record on pages 8-10 as follows:

> "The case then went to trial and was tried throughout subject to and in accordance with the aforesaid ruling of the Court, and upon the theory and basis and with the effect of the Defendant not being permitted to defend the suit on the grounds of contributory negligence, recklessness and wantonness."

Jurisdictional Statement

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code (28 U. S. C. 347). The decision was rendered in this case by the United States Circuit Court of Appeals on April 29, 1948 and judgment was entered on the same day (R. 21). The sending down of the mandate was stayed by order dated May 13, 1948, provided an application for a writ of certiorari was filed within thirty days from said date (R. 21). A subsequent order dated May 29, 1948 was granted staying the sending down of the mandate provided the application therefor was filed in the Supreme Court within thirty days from that date. The Petition and application for a writ of certiorari and the supporting brief was filed in the office of the Clerk of Court of the Supreme Court of the United States before June 29, 1948.

The Questions Presented

The questions presented are,—

Point A

Whether the optional South Carolina Workmen's Compensation Act, which deprives an employer, who exercises his option and elects, as he has a perfect right to do to have

any cases against him tried in the Courts, of the defense of contributory negligence also deprives him of the defense of contributory recklessness and contributory wantonness and contributory willfulness.

POINT B

Whether to construe the provisions of the Act in question as depriving the employer of defenses not mentioned in the Act, with the resultant verdict and judgment herein and its threatened collection would not constitute the taking of petitioner's property without due process of law in violation of the due process clauses of the Constitution of the United States.

POINT C

Incidentally, the effect of the Stipulation of Counsel hereinbefore quoted, which was a solemn and sedate agreement between counsel, which agreement squares with the self-evident facts that the case was tried throughout subject to the ruling of the Court which bodily struck from the answer the defense referred to herein, and that the case was tried throughout upon the theory and basis and with the effect of the defendant (now the petitioner) not being permitted to defend the suit on the ground of contributory negligence, recklessness and wantonness.

Reasons Relied On for the Allowance of the Writ

POINT 1

We submit that the writ of certiorari sought herein should be granted under the provisions of Rule 38 of the Supreme Court because, we submit, the Circuit Court of Appeals herein has decided an important question of local law in a way probably, (and in fact), in conflict with the applicable local decisions, and has failed to decide the

question of Federal and Constitutional Law presented by the record, which federal and constitutional question should be decided by the Supreme Court, and has, incidentally, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Court's power of supervision.

It is submitted that the decision of the Circuit Court of Appeals herein is contrary to the following decisions of the Supreme Court of South Carolina which are referred to in the supporting brief hereto attached as to the distinction between negligence and contributory negligence and contributory recklessness, wantonness and willfulness, namely:

Pickens v. *South Carolina & Georgia Railroad Company*, 54 S. C. 498: 32 S. E. 567;
Bailey v. *Smith*, 132 S. C. 212: 128 S. E. 423;
Humphries v. *Railway Company*, 90 S. C. 442: 73 S. E. 870;
Lawson v. *Railway*, 91 S. C. 201: 74 S. E. 481;
Gossett v. *Telegraph Company*, 95 S. C. 397: 79 S. E. 309;
Glenn v. *Railway Company*, 145 S. C. 41: 142 S. E. 801;
Spillers v. *Griffin*, 109 S. C. 78; 95 S. E. 133;
Chisolm v. *Railway*, 121 S. C. 394: 114 S. E. 845;
Colt v. *Britt*, 129 S. C. 226: 123 S. E. 845;
Osteen v. *Railway*, 119 S. C. 438: 112 S. E. 352;
Horne v. *A. C. L.*, 177 S. C. 461: 181 S. E. 642;
Nuckolls v. *Great Atlantic Tea Company*, 192 S. C. 156: 5 S. E. (2nd) 862;
Caughman v. *Y. M. C. A.* (Decided May 15, 1948).

It is further submitted that the decision of the Circuit Court of Appeals is contrary to following decisions of the Supreme Court of South Carolina, as to the proper statutory construction of the statute which deprives the em-

ployer, as to negligence, only of the defense of contributory negligence which decisions are likewise referred to in the supporting brief, namely:

Beaty v. *Richardson*, 56 S. C. 173: 34 S. E. 73;
Clegg v. *City of Spartanburg*, 132 S. C. 182: 128 S. E. 96;
Powell v. *Greenwood County*, 189 S. C. 463: 1 S. E. (2nd) 624.

POINT 2

It is submitted that the constitutional point raised to the effect that to construe the provisions of Section 15 of the South Carolina Workmen's Compensation Act as depriving the employer in question of defenses not mentioned or referred to therein with the resultant verdict and judgment and its collection would constitute the taking of petitioner's (defendant's) property without due process of law in violation of the due process clauses of the Constitution of the United States, constitutes an important question of Federal Law which has not been, but should be settled by the United States Supreme Court.

POINT 3

It is submitted that counsel having entered into a solemn stipulation and agreement, which definitely squares with the self-evident facts which are incidentally involved, that the case was tried throughout subject to and in accordance with the rulings of the District Court which bodily struck from the record the defenses of contributory recklessness and contributory wantonness and that the case was tried throughout "upon the theory and basis and with the effect of the defendant not being permitted to defend the suit on the grounds of contributory recklessness, contributory negligence and contributory willfulness"; that the Circuit Court of Appeals should have granted full force and effect to said stipulation and should not have endeavored to pass

on the question involved merely from the pleadings and undisclosed "statements at the Bar of the Court."

Wherefore, your Petitioner-Appellant prays that a writ of certiorari be issued under the seal of this Court directed to the Circuit Court of Appeals of the Fourth Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Court in the case numbered 5711, Bath Mills, Inc., Appellant against Theodore Odom, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fourth Circuit be reversed by the Court, and for such further relief as this Court may see proper.

P. F. HENDERSON,
HENDERSON & SALLEY,
Counsel for Petitioner.

Aiken, South Carolina,
June 17th, 1948.

INDEX TO BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 113

BATH MILLS, INC., *Petitioner and Appellant*

versus

THEODORE ODOM, *Appellee and Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

General Statement

In the foregoing petition, we have fully stated the case and have stated that the jurisdiction of the Supreme Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 347-a). The opinion of the Circuit Court of Appeals is printed in full in the Record (pp. 18-21). In the petition we have stated that we contend that the Writ of Certiorari should be granted because the Circuit Court of Appeals (a) has decided an important question of local law in a way probably in conflict with applicable local decisions, (b) has failed to decide a federal question which has not been, but should be settled by the Court, and (c) has inci-

dentally, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Specifications of Errors

The Circuit Court of Appeals for the Fourth Circuit erred it is respectfully submitted in holding:

Point A

That the Workmen's Compensation Act of the State of South Carolina deprives an employer who elects to have claims on the part of his employee adjudicated in the Courts, of the defenses of contributory recklessness, contributory wantonness and contributory willfulness; it being submitted that the decision of said Court is contrary to the local decisions of the Supreme Court of South Carolina upon the subject involved.

Point B

That to construe the provisions of the Workmen's Compensation Act in question as depriving the employee of the defenses not mentioned in the Act, with the resultant verdict and judgment rendered herein and its threatened collection constitutes the taking of appellant's property without due process of law and constitutes a violation of the due process clauses of the Constitution of the United States.

Point C

That the Circuit Court of Appeals erred, if it intended to so rule, in not giving the appellant the benefit of the stipulation of counsel to the effect that the case was tried throughout subject to the ruling of the District Court which bodily struck from the answer the defense of contributory recklessness and contributory wantonness and that the case was tried throughout upon the theory and basis and with the

effect of the defendant (appellant) not being permitted to defend the suit on the grounds of contributory recklessness and contributory wantonness.

ARGUMENT

Point A

The Circuit Court of Appeals erred, we respectfully submit, in sustaining the ruling of the District Court in striking from the answer, Appellant's defense of Contributory Recklessness and Wantonness and thereby, as counsel agreed in their stipulations, as a fact depriving Appellant throughout the trial of that defense.

We submit in the words of Rule 38 of the Supreme Court that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions," which local decisions by the Supreme Court of South Carolina we now ask to present, after which we will endeavor to reply, seriatim, to the various postulates embodied in the brief decision of the Circuit Court of Appeals.

The Sharp Distinction Between Contributory Negligence and Contributory Recklessness, Wantonness and Wilfulness.

The marked difference between negligence on the one hand and willfulness (which includes and is in fact the same thing as recklessness and wantonness) on the other hand and between contributory negligence on the one hand and contributory willfullness (which includes and is in fact the same thing as contributory recklessness and contributory wantonness) has long been recognized, applied and enforced by the Supreme Court of South Carolina. It may be profitable to trace the history, and to note the wide

difference established by that Court between the opposing elements.

We may quite properly start with the somewhat famous *Pickens* case *(Pickens* v. *South Carolina and Georgia Railroad Co.,* 54 S. C. 498; 32 S. E. 567). Therein Mrs. Pickens, wife of South Carolina's Governor during the war of 1861-5, bought a round trip ticket from Edgefield, South Carolina, via Aiken to Augusta good for ten days with a change of trains in Aiken. When Mrs. Pickens tried to make the return trip and reached Aiken within the ten day period, she found that the connecting train from Aiken to Edgefield had been discontinued. She consequently had to leave the Aiken depot in a storm and suffered exposure which resulted in serious illness. Proof was presented that when the railroad sold the round trip ticket that the management knew that the Aiken-Edgefield train would be discontinued within the ten day period, although the agent who sold the round trip ticket did not know that fact. In keeping with the then existing practice there were two causes of action in the complaint, one based on negligence, the other on "wanton and reckless disregard of Plaintiff's rights." The Supreme Court of South Carolina in deciding the case sharply distinguished between the two legal principles, not as a difference in degree, but as a difference in fact and in principle. The Court quoting, with approval, from the American & English Encyclopaedia of Law, said—

> "The element which distinguishes actionable negligence from criminal wrong or wilful tort, is inadvertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty—that is, he cannot be conscious that it is a want of ordinary care —without subjecting himself to the charge of having inflicted a wilful injury, because one, who is consciously guilty of a want of ordinary care, is, by implication of

> law, chargeable with an intent to injure, malice being but the 'wilful doing of a wrongful act' • • • Negligence and wilfulness are the opposites of each other. They indicate radically different mental states. The distinction between negligence and wilful tort is important to be observed, not only in order to avoid a confusion of principles, but it is necessary in determining the question of damages, since in case of an injury by the former, damages can only be compensatory; while in the latter, they may also be punitory, vindictive or exemplary."

We call especial attention as stating the crux of the matter to the statement of the Court that "negligence and willfullness are the opposites of each other." "Inadvertence" earmarks negligence; while "adverting" to what one should do and "consciously" failing to do it, earmarks recklessness or wantonness or willfulness. Of course, as the Court stated, actual damages are allowed in South Carolina in negligence cases, and punitive damage only where recklessness or wantonness or willfulness is present.

The Pickens decision was rendered in 1898. The distinction and the principle involved during the next twenty-five years are frequently enforced by the Supreme Court of South Carolina. In 1925 the Court in its decision in re *Bailey* v. *Smith,* 132 S. C. 212; 128 S.E., 423, collected most of the decisions of the period referred to, hence as covering that period, we quote somewhat copiously from the Bailey decision. The Court said:

> "Plaintiff's counsel cites the following cases as applicable to the facts of this case: Norris *v.* Greenville Ry., 111 S. C. 322; 97 S.E., 848. Bussey *v.* Charleston & W. C. Ry., 75 S. C., 129; 55 S.E., 163. Tinsley *v.* Western Union, 72 S. C., 350; 51 S.E. 913. Gedding *v.* Atlantic Coast Line R. Co., 91 S. C., 486; 75 S. E. 284; and Proctor *v.* Southern Ry. Co., 61 S. C. 170; 39 S. E., 351.

"In the Norris Case we find this definition of willfulness:

'These exceptions cannot be sustained, for the reason that not only is the conscious invasion of the rights of another in a wanton, willful, and reckless manner an act of wrong, but also when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary reason and prudence would say that it was a reckless disregard of another's rights.'

"In Bussey *v.* Railway the Court points out that recklessness is an equivalent of willfulness or intentional wrong:

'These exceptions must be overruled for the reasons that we have already shown there was testimony tending to prove recklessness, which is the equivalent of willfulness or intentional wrong. Pickett *v.* Railway, 69 S. C., 445; 48 S.E., 466.'

"In Tinsley *v.* Western Union we have this definition:

'An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness or willfulness.'

"Geddings *v.* Railroad Co. is to the same effect:

'It is only necessary to refer to the case of Tolleson *v.* Railway, 88 S.C., 7, to show that this exception cannot be sustained. In that case, the Court uses this language: "Not only is the conscious invasion of the rights of another, in a wanton, willful, and reckless manner, an act of wrong, but that the same result follows, when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner, that a person of ordinary prudence would say, that it was a reckless disregard of another's rights." '

"And Pickett *v.* Southern Ry. Co., 69 S. C. 445; 48 S.E., 466, quoting from an earlier case, points out that gross negligence amounting to recklessness becomes willfulness:

'In Proctor *v.* Railroad, 61 S. C., 170; 39 S.E. 351, the Court says: "It is quite true that negligence may be so gross as to amount to recklessness, but when it does, it ceases to be mere negligence, and assumes very much the nature of willfulness; so much so, that it has been more than once held in this state, that a charge of reckless misconduct will justify the jury, if the same be proved, in awarding punitive, vindictive or exemplary damages, while it never has been held, so far as we are informed, that the jury under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages." ' "

The Bailey decision, although it practically covers the field of the period referred to, omits the following decisions, (and possibly a few others) from which we ask to quote briefly as follows:

Humphries v. *Railway Company,* 90 S. C., 442; 73 S.E., 870:

"From the testimony it will be seen there 'was no failure on the part of the defendant to observe due care,' as laid down in Watts *v.* South Bound R. R. Co., 60 S. C., page 67, 38 S.E. 240; Tinsley *v.* Telegraph Co., 72 S. C. page 350, 51 S.E. 913. There is no evidence showing that the servants of defendant consciously or intentionally did any act, or consciously or intentionally failed to do what it ought to have done at the time of the collision of the wagon in which plaintiffs were riding. There was evidence to prove ordinary negligence, but none to show conscious advertent wrong."

Lawson v. *Railway,* 91 S. C. 201, 74 S.E. 481.

"In Tinsley *v.* Telegraph Company, 72 S. C. 354-355 S.E. 913, the Court says: 'A conscious failure to observe due care is wantonness or willfulness.' "

Gossett v. *Telegraph Co.*, 95 S. C., 397, 79 S.E., 309.

Herein the following charge to the jury was approved by the Supreme Court. The presiding Judge had charged the jury as follows:

> "By the word negligence we mean the failure to observe due care. It is the failure to do that which a person of ordinary prudence would do under the same circumstances, or it is the doing of something that a person of ordinary prudence would not have done under the same circumstances. That is what we mean by negligence. It is the failure to observe proper care under the circumstances. Now, where a person simply fails to observe due care inadvertently, fails to do his duty, why you call that negligence, where he just simply fails, inadvertently fails, to do his duty; but where a person adverts to his duty and thinks about his duty and knows about his duty, and then consciously violates his duty, we call that willful."

In 1928, the Court re-affirmed the distinction in question, in *Glenn* v. *Railway Company*, 145 S. C., 41, 142 S.E., 801, saying:

> "Negligence signifies inattention, or, in other words, an unconscious failure to realize the danger of the situation. Willfulness signifies conscious disregard of consequences.
>
> "'In giving application and effect to the provisions of the statute, there should be kept in mind the distinction between negligence and willfulness, pointed out by Mr. Justice Jones, later Chief Justice Jones, in the case of Tinsley *v.* Telegraph Co., 72 S. C., 350; 51 S.E., 913:
>
> " 'An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness and willfulness.' "

Hence, the irresistible conclusion is that as the Supreme Court of South Carolina has definitely held repeatedly that

there is a vast difference between negligence on the one hand and willfulness, recklessness and wantonness on the other hand. The Supreme Court of South Carolina throughout the years has adhered to its first preachment in the *Pickens* case that "Negligence and willfulness are the opposites of each other"; and in the Bussey decision and the Pickett decision (referred to in the Bailey decision, *supra)* the Court definitely held that "recklessness, is the equivalent of willfulness."

Most of the decisions hereinbefore referred to deal with actionable negligence and actionable recklessness, willfulness and wantonness. There are, however, many decisions upon contributory negligence on the one hand and contributory recklessness, willfulness, and wantonness on the other hand.

For instance, it was once claimed that contributory willfulness is not a defense to willfulness. The following South Carolina decisions however, definitely hold to the contrary:

Spillers v. *Griffin,* 109 S. C., 78, 95 S. E., 133;
Chisolm v. *Railway,* 121 S. C., 394, 114 S. E., 500;
Colt v. *Britt,* 129 S. C., 226, 124 S. E., 845;
Osteen v. *Railway,* 119 S. C., 438, 112 S. E., 352;
Horne v. *A. C. L.,* 177 S. C., 461, 181 S. E., 642.

In *Spillers* v. *Griffin,* 109 S. C., 78, 95 S. E., 133, the Court undertook to set out the science of the matter. After adverting to the contention that contributory willfulness is not a defense to willfulness, the Court said:

> "If there is not law to allow the defense of contributory wilfulness, so there is not law that allows a plaintiff to recover when he has himsef contributed wilfully as a proximate cause to the injury, * * * Law is a science, and it is the duty of the Courts to apply well recognized principles of law to new conditions."

Thus it will be seen that no matter what has been the conduct of the defendant (whether negligent or willful) the plaintiff cannot recover "when he has himself contributed willfully as a proximate cause to the injury." This is our position herein.

Then the Court, dealing as it was in the *Spillers* case, alone with the question of whether contributory willfulness offsets willfulness, said:

> "When two people are equally at fault in producing the injury, the law leaves them where it finds them. • • • If the parties were equally, in the same class, to blame in producing the injury, neither can recover."

But if a man is reckless, willful or wanton, his conduct is more culpable than if he is merely negligent. Contributory negligence offsets negligence. *A fortiori,* certainly, contributory willfulness necessarily offsets mere negligence.

Judge Timmerman (the District Judge who tried this case) agreed with this view and held in his decree (R. 29):

> "The Supreme Court of South Carolina has held in effect that contributory recklessness, wilfulness or wantonness, if established, is a good defense in an action based on simple negligence • • • ."

Hence, we respectfully submit, that it definitely appears that the "applicable local decisions," namely the decisions of the Supreme Court of South Carolina recognize and establish a vast difference between negligence and contributory negligence on the one hand and recklessness, wantonness and willfulness and contributory recklessness, wantonness and willfulness on the other hand. The distinction is recognized, has been established and is applied in South Carolina, both in awarding actual or punitive damages, and also, and more to the point herein, in determining what conduct on the part of a plaintiff as a defense interposed by

a defendant, will bar his recovery. We alleged and were ready to prove contributory recklessness and wantonness on plaintiff's part—that he "advertently" and "consciously" failed to do what he as an electrician knew that he should do (R. p. 26) "in doing his work, with and about the fuses and the fuse box referred to in the Complaint."

Parenthetically, it should be stated that the defendant's answer was served before the Complaint was amended and it denies the allegations of the original Complaint not only of negligence, but also of gross negligence, willfulness and wantonness on the part of the defendant. The amended Complaint deleted these allegations, but it was stipulated that the Answer as originaly drawn should stand as the Answer to the amended Complaint. This accounts for the otherwise superfluous language in the Answer.

A Statute in Derogation of Common Law, Can Deprive a Litigant Only of the Rights Specifically Referred to Therein.

The Supreme Court of South Carolina has definitely recognized and established as the law of South Carolina the general rule as above stated in a form applicable to this case.

At common law a defendant, certainly in South Carolina, in a tort case brought against him, by his employee, has available to him the defenses that (1) the plaintiff-employee was negligent, (2) that the plaintiff-employee was reckless or wanton or willful, (3) the defense of assumption of risks and (4) the fellow servant defense. Section 15 of the Act, in derogation of common law deprives the defendant, who elects not to operate under the optional Compensation Act, of three of these defenses, but definitely refrains from depriving him of the defense that the plaintiff-employee was reckless and wanton.

The undoubted rule in South Carolina and elsewhere we submit is that only the exclusions that are specifically named are effective deprivations of the defendant's hitherto legal defenses.

We quote briefly from several decisions of the Supreme Court of South Carolina.

In *Beaty* v. *Richardson*, 56 S. C. 173, 181; 34 S. E. 73, the Court said:

> "Every statute derogatory of the rights of property, or that takes away the rights of a citizen, is to be strictly construed. So, also, a statute in derogation of the common law."

In *Clegg* v. *City of Spartanburg*, 132 S. C. 182, 190, 128 S. E. 96, in reference to Statutes, the Court said:

> "Under the general principle of interpretation, expressio unius est exclusio alterius."

In *Powell* v. *Greenwood County*, 189 S. C. 463, 465; 1 S. E. (2nd) 624, in which the question was whether "a statute providing for division between railroad and county of cost and maintenance of structures for elimination of grade crossings" held that its provisions did not permit a railroad to recover the cost of the repairs of a replacement bridge made by a railroad, on a county highway. The Supreme Court adopted with approval the following language of the Circuit Judge:

> "I am of the opinion that Sections 8437 to 8447 apply only to the elimination of existing grade crossings. These sections are in derogation of the common law and therefore will have to be strictly construed."

In *Nuckolls* v. *Tea Company*, 192 S. C. 156; 5 S. E. (2nd) 862, in which the provision of the Workmen's Compensa-

tion Act of South Carolina in question, was directly involved, the Supreme Court of South Carolina ruled:

> "Regarding the presumption against change of the common law by a statute, it is stated in 25 R. C. L. 1054, that it is not presumed that the Legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; that it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention; that the rules of the common law are not to be changed by doubtful implication or overturned except by clear and unambiguous language."

Hence, we submit that when Section 15 of the Act deprived the defendant, in derogation of common law, of the three defenses mentioned, and not the defense of contributory recklessness, willfulness and wantonness, that it was, *ipso facto,* left intact.

We recognize, of course, the fact that the general rule is that Workmen's Compensation Acts must be liberally construed as to cases which actually come within its purview, but the rule is entirely different when the question which comes before the Court, is what matters the Act actually reaches. *Tedars* v. *Veneer Company,* 202 S. C. 363; 25 S. E. (2nd) 235.

A Respectful Reply to the Legal Positions Embodied in the Decision of the Circuit Court of Appeals

The chief postulate of the decision herein of the Circuit Court of Appeals (R. 19) is that it is perfectly clear that the purpose of the South Carolina Workmen's Compensation Act as established, the Court says, by the Supreme Court of South Carolina in its decision in re *Nuckolls* v. *Tea Company, supra,* "was to deny to the employer who elected not to operate under it the standard defenses of assumption of risk, the fellow servant rule and contributory negligence

in a suit for damages by an employee and leave, for practical purposes, only the question whether defendant was negligent and whether that negligence was the proximate cause of the injury."

We respectfully submit that the Nuckolls decision does not support this ruling. If it touches the instant case it supports our position, in that what it actually states is that the defense, as to negligence, that is barred by the statute is contributory negligence. The South Carolina Court simply was not passing on the question involved in the *Odom* case; the point that the Court was passing on was the plaintiff's contention that all that he had to prove in order to carry his case to the jury, was an injury arising out of an accident while working for his employer, that is to say that as to an employer who has elected not to operate under the Act, the plaintiff did not have to prove any negligence on the part of an employer as a proximate cause of the injury, but that the burden of proof is cast by the Statute on the employer.

What the Supreme Court of South Carolina did and all that it did, on this point, was to reject that contention. The Court after quoting the statutory provision in question said,—

> "Hence our Act, which is elective, deprives the employer who does not elect to come thereunder, of the common-law defenses of assumption of risk, fellow-servant rule, and contributory negligence.
>
> "However, common-law recovery against an employer who elects to remain outside the Workmen's Compensation Act, is still predicated upon actionable negligence. Even with the defenses removed, the employee has the burden of proof on the issue of the employer's negligence. Such an employee, although benefiting by the taking away of the defenses enumerated, must still prove facts showing actionable negligence upon the part of the employer, and, proceeding at com-

mon law, prove his common-law right to recovery. The statute purports only to deprive the non-assenting employer of certain named defenses, and it was not the intention of the Legislature, as we view it, in addition to abrogating those defenses, to establish a statutory right of recovery based on the fact that the employee sustained injuries 'by accident arising out of and in the course of his employment'."

We respectfully submit that the main postulate of the Circuit Court of Appeals decision is not supported by the Nuckolls decision, but that its every intendment is to the contrary.

This intendment referred to is carried forward by the Supreme Court of South Carolina in a very recent Workmen's Compensation decision, *Caughman* v. *Y. M. C. A.* (Westbrook's Report of May 15, 1948), in which the Court ruled,—

> "Our Act is not compulsory. Either the employer or the employee may elect not to be bound by its provisions. If the employer does so, he is only deprived of the common law defenses of assumption of risk, fellow servant rule and contributory negligence if sued by any employee for damages at common law, Section 7035-17 of the 1942 Code; Nuckolls *v.* Great Atlantic & Pacific Tea Co., 192 S. C. 156, 5 S. E. (2nd)."

We re-iterate the contention that the Nuckolls decision, relied on by the Circuit Court of Appeals, does not support the major premise of its opinion herein. The point involved in this case, was simply not involved in the Nuckolls decision. But the Nuckolls decision did endorse, as we have hereinbefore pointed out the fact that as the statute which is in derogation of common law, listed three defenses that the employer is deprived of, that he is not deprived of any not listed—*expressio unius est exclusio alterius.*

Nor has the Court, nor counsel cited any decision by the

Supreme Court of South Carolina, nor by any Court which supports the doctrine in question. We submit that the logic of the matter is to the contrary.

So far as our own thinking is concerned, we reduce our reply to the Circuit Court of Appeals' reasoning to a very simple formula. We submit that if the Legislature of South Carolina, had intended, as the Court holds, to provide that in cases like the present one the only questions for trial would be whether the defendant was negligent, and whether that negligence was the proximate cause of the injury, the Legislature would have said so in plain English. But it did not.

The second postulate of the decision of the Circuit Court of Appeals is that the employer may not avail himself "in the teeth of the statute" of the rejected defense by simply calling the employee's mere contributory negligence, by another name. We agree, of course, with this statement but submit that the Supreme Court of South Carolina has definitely held that contributory negligence is a distinct and different thing from contributory recklessness, wantonness and wilfulness. That Court in the Pickens decision *supra* held, "negligence and wilfulness are the opposites of each other." The Circuit Court of Appeals cited the decision of the United States Supreme Court in *Tiller* v. *Railroad*, 318 U. S. 54, 87 L. Ed. 610, as supporting its conclusion. The Court therein did, of course, state that where the elements considered therein were simply different degrees of assumption, of risk, that the appellant could not, by calling the element he wished to avail himself by a different name, circumvent the existing inhibition. Certainly that is correct. But in the instant case we are dealing with, the Supreme Court of South Carolina has held, different and distinct legal elements and doctrines.

The third position stated by the Circuit Court of Appeals is that "while the question here has not been before the

Supreme Court of South Carolina" that in *Thornhill* v. *Davis*, 121 S. C. 49; 113 S. E. 370, that Court "has ruled in a federal employer's liability case that 'contributory recklessness and wilfulness' might not be treated as a defense distinct from contributory negligence."

The Thornhill decision was rendered by an Acting Associate Justice (Mr. Harry N. Edmunds, who temporarily sat with the Court), and if from his language any such conclusion as the Court suggests can be gleaned, it was certainly a mere obiter on his part and cannot be taken as abrogating the many decisions of the more permanent members of the Court, cited hereinbefore, some rendered before the Thornhill decision was rendered and many after, to the effect that negligence and recklessness, wantonness and willfulness are the opposites of each other. But a careful examination of the decision shows no such intention even on the part of the Acting Associate Justice.

We do not burden this brief with a discussion of the Thornhill decision, but state that if the Court is interested in analyzing it, the Court will find that the defense of contributory negligence, not contributory recklessness or wantonness or willfulness, was pled. The Court will further find that the remark of the Acting Associate referred to was directed to the refusal of a motion for a directed verdict on the ground that deceased had met his death by his own gross negligence, when gross negligence was not even pled, and certainly contributory recklessness, wantonness and willfulness was not pled. Hence the question of the effect of the latter element was not before the Court and it easily followed therefore, (without the point herein involved being before the Court) that a directed verdict therein could not have been granted. The Court, if it examines the Thornhill decision, will find that the only assignments of error that approach the present question raise the contention that the presiding Judge "erred in failing to charge

the jury that the plea of contributory 'recklessness or wilfulness' was a complete defense under the Federal Employer's Liability Act." Manifestly these assignments of error were not sustained. There was no pleading to raise the question, nor was a request to charge presented. We submit that the Thornhill decision is not pertinent to the present inquiry.

To summarize we submit in reply, as to the decision herein,

(a) That neither the Nuckolls decision nor any other decision of the Supreme Court of South Carolina holds that the effect of its Workmen's Compensation Act, in cases against employers who elect not to operate under it, is to limit the question to be tried by the Courts solely to the question of whether the employer has been guilty of negligence and whether that negligence was the proximate cause of the injury. We submit that the true rule is to the contrary.

(b) That while the doctrine of the Tiller decision to the general effect, to apply to this case, that the employer may not avail himself of an inhibited defense by calling it by another name, is undoubtedly correct; that such doctrine does not apply to the instant case.

(c) That the Thornhill decision does not control the present case.

POINT B

The Circuit Court of Appeals erred, we respectfully submit, in not passing on and in not sustaining petitioner's second point on which it relied in its appeal to that Court (R. 33) which raised a Federal question and a Constitutional point.

By its second point (R. p. 33) petitioner contended and now contends and submits that the action of the presiding

Judge in dismissing and striking defendant's second defense of contributory recklessness and contributory wantonness throughout the trial which is a separate and distinct defense from contributory negligence, with the verdict rendered upon the trial and the resultant judgment and its threatened collection constitutes the taking of defendant's property without due process of law in violation of the due process clauses of the Constitution of the United States.

POINT C

The Circuit Court of Appeals erred, we respectfully submit, if it intended so to rule, in not giving the appellant the full benefit of the Stipulation of Counsel.

It was stipulated and agreed between counsel for the appellant and the appellee, in a written and signed agreement (R. p. 28), as follows—

> "The case then went to trial and was tried throughout, subject to and in accordance with the aforesaid ruling of the Court, and upon the theory and basis and with the effect of the defendant not being permitted to defend the suit on the grounds of contributory negligence, recklessness and wantonness."

The ruling referred to was, of course, the District Judge's order striking the second defense from the answer. This stipulation absolutely squares with the facts as revealed by the record and the facts which necessarily and naturally existed.

We do not know that the consideration of this matter is at all necessary in the consideration of this petition because the Circuit Court of Appeals does not rely upon this point, but in reality bases its decision squarely on the merits of the main question involved and seems to be quite willing for the Supreme Court to pass on the main question. How-

ever, in the second paragraph of its decision the Court says "the evidence on the trial was not brought up with the record and it does not appear that, even if the defense were available in a proper case, that the defendant was prejudiced by striking it here," and the Court further says that "it is perfectly clear from the pleadings and statements at the bar of the Court that the facts upon which the defendant relied amounted to nothing more than contributory negligence" and that if the Court entertained any doubt thereabouts, it would order the record to be sent up, but that this is not necessary as the Court says, in effect, that it stands on the merits of the legal question. As the Court did not order the testimony sent up, and therefore has not considered what it might reveal, we submit that this phase of the matter is not now pertinent. If it is pertinent, we submit, that all parties were bound by the sensible and unequivocal stipulation which they agreed to.

The Court says, however, that the pleading revealed only contributory negligence. To the contrary, we submit that the answer (R. p. 26) definitely pled contributory recklessness and wantonness. The Court also refers to "statements at the bar of the Court." It does not say what these statements were or by whom they were made. If statements at the bar were to be mentioned at all, we would have preferred that this be done. Inasmuch, however, as it has not been done by the Court we presume counsel should not attempt to do so. Certainly then we go back to the stipulation, which is complete and logical, namely, that the case was tried throughout subject to and in accordance with the ruling of the District Judge who struck out petitioner's second defense. Hence the defense was never before the jury. The jury, therefore, knew absolutely nothing of its existence. It was a hushed and forbidden subject in the trial. Even if incidentally some facts came out on which it

might have been based, they could not be pointed up, stressed and connected up by counsel. The subject, we repeat was a forbidden subject. Sending up the record now as the Court suggests would do no good, because the record was not built with the question involved as a part of it. The question was, we repeat, a completely forbidden subject. The District Judge could not and did not rule on the sufficiency of the testimony because, as we have stated, counsel for the defendant was not permitted by the Court to build up a record to present that question but was reprimanded when the Court thought he was trying to do so. Counsel for the plaintiff having already been successful in striking the defense from the answer, was not interested in the point. Then, of course, counsel could not even mention contributory recklessness, wantonness, or wilfulness in argument, nor did the District Judge do so in his charge. So the stipulation was literally correct.

We earnestly submit that the Writ of Certiorari should be granted.

P. F. HENDERSON,
HENDERSON & SALLEY,
Petitioner's Attorney.

Aiken, South Carolina, June 17th, 1948.